IN THE

Supreme Court of the United States

October Term, 1979
No. 79-67

WILLIAM WALTER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Brief of Petitioner Walter on Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

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Brief of Petitioner Walter on Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

Petitioner William Walter respectfully prays that the opinion and judgment of the United States Court of Appeals for the Fifth Circuit be reversed.

Opinions Below.

The 2-1 opinion of the Court of Appeals was filed on April 2, 1979, and appears as Appendix A to the petition. The decision is reported at 592 F.2d 788. A per curiam opinion, reported at 597 F.2d 63, which denied a petition for rehearing and petition for rehearing en banc yet discussed an issue previously asserted and not before commented upon by the court was entered on June 15, 1979 and appears as Appendix B to the petition.

Jurisdiction.

The judgment of the Court of Appeals was entered on April 2, 1979, over the dissent of Circuit Judge Wisdom. Petitioner duly filed a petition for rehearing with suggestion for determination en banc, which petition was denied on June 15, 1979, after the court had been polled at the request of one of its members for an en banc hearing. A copy of the order denying said petition appears as Appendix B to the petition. Thereafter, petitioner filed a motion for stay of issuance of mandate pending petition for writ of certiorari to the United States Supreme Court, which motion was granted on June 22, 1979, provided a petition for writ of certiorari was filed in the clerk's office of this Court on or before July 15, 1979. A copy of the order staying issuance of the mandate is attached as Appendix C to the petition. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). A timely petition for a writ of certiorari was duly filed on July 16, 1979, and on October 15, 1979, the petition was granted.

Constitutional and Statutory Provisions Involved.

The pertinent provisions of the First, Fourth, Fifth and Sixth Amendments to the Constitution, Title 18, United States Code §§ 2, 371, 1462 and 1465 and Rule 14, Federal Rules of Criminal Procedure, appear as Appendix D to the petition.

Questions Presented.

The petitioner was charged with conspiracy and aiding and abetting violations of the federal obscenity laws. Twelve sealed cartons containing 871 8mm films of male homosexual orientation were taken by a third

party from a common carrier and then, at the FBI's direction, held for five days before the FBI took delivery of them. FBI agents viewed the films two months later and two months after that turned the films over to the United States Attorney's Office. Over a year later an indictment was returned charging that five of the 25 titles of film were obscene. No search warrant was ever obtained, nor was there ever an adversary hearing. Trial evidence revealed petitioner was a business partner of a defendant shown to have authorized the shipment of film. Petitioner, however, was not shown to have ever seen the films in question or to have exercised any role in the business within two months either before or after the shipment. With the foregoing explanation, the questions presented are:

(1) Whether the FBI's acceptance from a third party of films wrongfully within that party's possession was a "seizure" subject to the warrant requirement of the Fourth Amendment, or alternatively, whether the rule fashioned in *Burdeau v. McDowell*, 256 U.S. 465, fifty years ago requires a two-step analysis of the "seizure" —that by the third party and that of the government —where First Amendment concerns are involved as has been held by the Eighth Circuit but not by the Fifth or Ninth Circuits.

(2) Whether the FBI's screening after a two-month hiatus of films received from a third party who had not viewed the films constituted both a "secondary search" subject to the warrant requirement of the Fourth Amendment as had been held in a similar case by the Eighth Circuit as well as a "search" within the teaching of *United States v. Chadwick*, 433 U.S. 1.

(3) Whether the Government by appropriating presumptively protected First Amendment material received

from a third party for one and one-half years without requesting a judicial determination of the obscenity *vel non* of said material committed a prior restraint the penalty for which is suppression of the material's use in a criminal trial in accordance with the provisions of the First, Fourth and Fifth Amendments to the Constitution and the interpretive decisions of this Court.

(4) Whether in an obscenity prosecution *derivative* proof of scienter solely through evidence of petitioner's participation in a management role in a presumptively legal business venture which shipped numerous films, and without any further proof that he knew of or authorized the solitary shipment of films charged as being obscene, deprived petitioner of freedom of speech and press and due process of law, contrary to the provisions of the First and Fifth Amendments to the Constitution and the interpretive decisions of this Court.

(5) Whether in an obscenity prosecution the refusal of the district court to instruct the jury that in calculating the mores of the community the term "average person" means "average adult" violated the teaching of *Pinkus v. United States*, 436 U.S. 293, that the community includes all adults who comprise it since "person" subsumes the class "children" and the instruction therefore deprived petitioner of freedom of speech and press and due process of law, contrary to the provisions of the First and Fifth Amendments to the Constitution.

(6) Whether in an obscenity prosecution involving films of an exclusively homosexual orientation an instruction foreclosing jury assessment of the prurient appeal, if any, of the films to homosexuals absent proof *beyond a reasonable doubt* that the films were

intended to appeal to the prurient interest of homosexuals deprived petitioner of freedom of speech and press and due process of law, contrary to the provisions of the First and Fifth Amendments to the Constitution and the interpretive decisions of this Court.

(7) Whether a juror who read a book and frequently stared at the floor on the sole occasion when the allegedly obscene films were screened for the jury was either incompetent to render a judgment regarding the obscenity *vel non* of the films which must be "*taken as a whole*" under the directive of *Miller v. California*, 413 U.S. 15, or so prejudiced against the defense that petitioner was deprived of freedom of speech and press, due process of law, and an impartial jury, contrary to the provisions of the First, Fifth and Sixth Amendments to the Constitution.

(8) Whether in an obscenity prosecution involving films of an exclusively homosexual orientation the refusal of the district court to *voir dire* the veniremen concerning their length of residence in the community, participation in community organizations, knowledge of community standards from the standpoint of personal exposure, knowledge of the mores, customs and practices of the homosexual community and opinion whether sexually explicit matter causes harm negated the mandate of *Smith v. United States*, 431 U.S. 291, that a defendant be given reasonable latitude in presenting *voir dire* questions to the veniremen and, accordingly, deprived petitioner of freedom of speech and press and due process of law, contrary to the provisions of the First and Fifth Amendments to the Constitution.

(9) Whether due process of law under the Fifth Amendment required that petitioner's case be severed

from co-defendant Sanders' so that co-defendant Grassi, who had entered a guilty plea during trial, could testify to exculpate petitioner and inculpate Sanders on the scienter issue, which Grassi had indicated he would do but not unless there were a severance since his former attorney was counsel for co-defendant Sanders and could impeach Grassi with other crimes Grassi had confidentially communicated to him if Grassi waived his attorney-client privilege and testified in favor of petitioner and against co-defendant Sanders.

(10) Whether the refusal of the district court to give petitioner's proffered jury instruction on his theory of the case developed through cross-examination that certain terms in the obscenity formulation were incapable of calculation deprived petitioner of freedom of speech and press and due process of law, contrary to the provisions of the First and Fifth Amendments to the Constituion and the interpretive decisions of this Court.

Statement.

Petitioner appeals from a judgment of conviction rendered after a trial by jury before the Honorable Wm. Terrell Hodges, a judge of the United States District Court for the Middle District of Florida, Tampa Division, under an indictment charging both conspiracy to violate and aiding and abetting violations of Title 18, United States Code, Sections 1462 and 1465.

The indictment was returned in the United States District Court for the Middle District of Florida, Tampa Division, on April 6, 1977, and contained eleven counts charging petitioner and five others (two of whom were corporations) with violations of federal obscenity laws.

(C.T. Vol. 1, Doc. 1.)[1] Count One charged a conspiracy both to use a common carrier to transport obscene matter in interstate commerce and to transport obscene matter in interstate commerce for the purpose of sale or distribution. Counts Two, Four, Six, Eight and Ten charged the petitioner and others with aiding and abetting one another in using a common carrier to transport obscene matter in interstate commerce. Counts Three, Five, Seven, Nine and Eleven charged the petitioner and others with aiding and abetting one another in transporting obscene matter in interstate commerce for the purpose of sale or distribution.

A. Prior to trial petitioner filed a motion to suppress and return the subject films. (C.T. Vol. 1, Doc. 18.) In connection with the hearing of that motion the following facts were adduced:

On Thursday, September 25, 1975, twelve (12) sealed boxes containing 871 8mm films of homosexual orientation were shipped via Greyhound Package Express from St. Petersburg, Florida, to Atlanta, Georgia (R.T. Vol. 1 Supp. at 6.)[2] The shipment, directed to "Leggs, Inc." on a "Will Call" basis, was reforwarded to a Greyhound substation contrary to Greyhound's usual practice of holding "Will Call" items for pick up—whereupon L'Eggs Products, Inc. ("LPI") was contacted to pick up the package. (R.T. Vol. 1 Supp. at 20-21, 33-35.)

Michael Horton, Area Manager for LPI, drove to Greyhound to pick up the packages on Friday, Septem-

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[1]"C.T." refers to the Clerk's Transcript of the Record on Appeal, "Vol." refers to the Volume Number and "Doc." refers to the Document Number.

[2]"R.T." refers to the Reporter's Transcript of the Record on Appeal.

ber 26, 1975. Horton, accustomed to receiving only one or two boxes weighing but a few pounds, was surprised to see twelve unusually wrapped and reinforced boxes weighing hundreds of pounds. Since the boxes did not look "normal" to him, Horton pried one open and removed a box of film labeled "David's Boys." The box purported to describe its film contents. (The "David's Boys" series of films found in the shipped cartons consisted of 25 different titles of film of which 5 were charged in the indictment.) Horton then replaced the box of film, advised an employee at the Greyhound terminus that the shipment did not belong to LPI and left. (R.T. Vol. 1 Supp. at 56, 59, 61, 76-77, 81-82, 99.)

When Horton returned to LPI he advised his Branch Manager William Fox about the shipment. Fox immediately went to the Greyhound terminus, examined a box of film from the already opened package and concluded that the 12 cartons were not the property of LPI. Fox did not pay the collect charges on the packages since LPI had no interest in them, but he took the shipment back to LPI nonetheless. (R.T. Vol. 1 Supp. at 119, 121, 129, 131; Vol. 7 at C-146-47, C-150, C-178.)

At LPI, Horton, Fox, Gregory Shults (LPI's Southern Regional Distribution Manager) and others opened all twelve cartons and examined the boxes containing the David's Boys films. Shults removed an 8mm film from its case and held it up to the light, but the frames of the film were too small to be observed in this fashion. Thereafter, Horton telephoned the FBI and informed Special Agent Lawrence Mandyck of what had happened. Mandyck instructed him to put the boxes in a safe place "where nobody can bother them" and

that the FBI would pick them up. (R.T. Vol. 1 Supp. at 63, 65, 90, 107, 133, 143-44, 171.)

Five days later on Wednesday, October 1, 1975, Agent Mandyck passed by LPI to pick up the 871 boxes containing film. Mandyck conceded that the box cover description of the films may have been incorrect and that he caused no application to be made for a search warrant during the five day hiatus although he easily could have obtained a warrant. At LPI the container cartons were arranged so that only the white tops of the boxes of film could be seen without removing the individual boxes from their container. Mandyck or another FBI agent opened a film box and unsuccessfully sought to "eye view" the reel of film therein. (The evidence reflects that each boxed reel of film was sealed by a piece of tape to keep it from unraveling. Accordingly, before a reel of film could be viewed, the tape had to first be removed.) (R.T. Vol. 1 Supp. at 93, 116, 134, 171, 192, 195, 206.)

On Friday, September 26, 1975, co-defendant Michael Grassi called from Atlanta to ask co-defendant Richard Larson in St. Petersburg, Florida what had delayed the expected shipment of films from Larson. Larson reported that the films had been shipped to the Atlanta warehouse via Greyhound using the name "Leggs, Inc." as consignee—"Legs" being the nickname of a female employee in the Atlanta warehouse. In the past, shipments had been made and received using the name "Leggs, Inc." That same day Larson contacted Greyhound express clerk Joe Harris in St. Petersburg to report the non-receipt of the shipment and to initiate a tracer on the package. He left a name and telephone number. (R.T. Vol. 1 Supp. at 13-14; Vol. 4 Supp. at 5-6; Vol. 7 at C-25, C-29-31.)

Gregory Shults of LPI attempted unsuccessfully to find out the consignor's address since it was fictitious. (Several witnesses explained that a fictitious name on shipment bills of lading was employed to prevent common carrier pilferage which occurred when the name of a known adult business was used.) Shults also spoke to Griffin Askew, Assistant Terminal Manager for Greyhound in Atlanta, to advise him that LPI was turning the shipment over to the FBI and he gave Askew the local FBI telephone number. (R.T. Vol. 1 Supp. at 31, 35-36, 50, 150, 167, 228-29; Vol. 4 Supp. 5-6.)

The defendants made numerous attempts to retrieve their misdelivered shipment. Ronald Bowman was sent to the Greyhound station in St. Petersburg on Monday, September 29, 1975 to look for the packages. A girl named Joyce telephonically contacted Griffin Askew at Greyhound on three occasions attempting to recover the shipment. Askew, however, had been advised by the FBI not to provide any information about the shipment and to call them if contacted about the twelve boxes. Askew complied with these directives. Defendant Grassi went to the Greyhound station personally three times looking for the package, leaving his name and number. He also contacted LPI on Tuesday, September 30, 1975, and several times thereafter. LPI never admitted that they had the shipment. LPI's Fox apparently received two calls from someone trying to get the films back and specifically recalls speaking to Grassi but he believed their telephone conversation occurred about two weeks after LPI acquired the films. (R.T. Vol. 1 Supp. at 36, 50-52, 125; Vol. 4 Supp. at 6-10; Vol. 7 at C-30, C-138, C-147.)

Agent Mandyck did not review the films in the boxes he seized until December, 1975, even though he was aware the defendants were trying to get their merchandise back. It was not until February, 1976, that Mandyck through the filing of a report notified the United States Attorney's Office in Atlanta, Georgia, that he had the films in question. An adversary hearing to determine the obscenity *vel non* of the films was never conducted. (R.T. Vol. 1 Supp. at 192, 193, 208; Vol. 7 at C-163.)

The trial judge concluded that petitioner had standing to assert the motion to suppress and return. (See petitioner's testimony, R.T. Vol. 1 Supp. at 223-257.) The motion was denied, however, on the grounds that defendants did not have a reasonable expectation of privacy in the subject materials and "that there was a private search and no Government seizure within the meaning of the Fourth Amendment." (R.T. Vol. 4 at 109-10, 115-16.)

B. Preceding the trial, petitioner filed proposed *voir dire* questions with the court. (C.T. Vol. 2, Doc. 46.) Some of the proposed questions the judge refused to ask prospective jurors, in addition to their length of residency in the community, were:

> "120. In this case you will be asked to view males engaging in homosexual sexual activity. Are you personally familiar with the attitudes and norms of the homosexual community?"
>
> "122. Do you believe your experience is inadequate to judge the appeal of these films to homosexuals unless expert testimony is presented?"
>
> "102. Do you feel the availability in the community of sexually explicit or graphic materials is on the increase or the decrease?"

"103. Does this fact disturb or offend you?"

"105. Have you ever known of anyone to have been harmed or hurt in any way by exposure to sexually explicit or graphic materials?"

"111. Will you be able to view films which depict certain sexually explicit activities, including mouth and genital contact, and intercourse, ejaculation, homosexual activity and interracial sex with open eyes and an open mind?"

"119. What organizations do you belong to in the community?"

C. Midway through the trial the five allegedly obscene films were projected for the jury. At the conclusion of the third film shown the jury, petitioner brought to the Court's attention that Juror Kohring was not viewing the films but had been reading a magazine during the screening. The judge directed him to put away the magazine. Thereafter, Kohring did not view much of the fourth film shown. At that time petitioner's counsel wrote a note to FBI Agent Hod Hunt asking him to observe whether Kohring was watching the fifth film during its screening. Mr. Hunt was instructed not to make this observation by Assistant United States Attorney John Lund and, accordingly, Hunt averted his eyes from the jury box during the showing of this final film. Again, Kohring did not view the screen for more than seconds at a time. (R.T. Vol. 8 at D-123 to D-129.) News personnel in attendance at the trial observed juror Kohring avert his eyes and so reported it. Moreover, Kohring, who wore glasses, put them on only for the purpose of reading and did not wear them for viewing the film. (R.T. Vol. 8 at D-124.) See Affidavit

of W. Michael Mayock and newspaper clippings and note to Hunt appended thereto. (C.T. Vol. 2, Doc. 51.)

Petitioner made a motion to replace Kohring with an alternate juror. The court rejected this request saying that although he had witnessed Kohring averting his eyes on a couple of occasions that Kohring had paid sufficient attention and further intimating that the jury would screen the films in the jury room during deliberations. (R.T. Vol. 8 at D-125.) Significantly, the jury had no projector in the jury room and so did not see the films again. (R.T. Vol. 11 at G-229.)

D. At the inception of the trial attorney Zell represented co-defendants Grassi and Sanders. Midway through the trial, Grassi, still represented by Zell, entered into a plea agreement with the prosecution on the condition that he testify for the prosecution at trial. Grassi thereafter obtained a new counsel, Hall, who advised him not to waive his attorney-client privilege with Zell since Hall had ascertained from Grassi that Zell could impeach Grassi with other crimes Grassi had confidentially communicated to Zell. At a hearing Grassi advised he would testify if Walter's case were severed from Sanders'. His testimony would have been exculpatory of Walter on the *scienter* issue in that petitioner did not knowingly transport the films by *common carrier* (R.T. Vol. 4 Supp. at 23) and did not know the "nature, character and contents" of the films. (R.T. Vol. 8 at D-10; Vol. 9 at E-3, E-5, E-9, E-117 to E-121.)

Petitioner was prejudiced not only in being tried with Sanders but with Sanders' lawyer as well. Zell was shown to have advised one witness, Maxey, to "take the Fifth" Amendment before the Grand Jury

(R.T. Vol. 9 at E-93 to E-94) and to have prepared Government's Exhibit 13 (Appendix E to the petition), a letter Zell wrote to an accountant attributing ownership of certain defendant corporations to defendants Grassi and Sanders which the Government contended was false. Petitioner sought unsuccessfully to have a hearing on Zell's obvious conflicts of interest one month in advance of trial. (C.T. Vol. 2, Doc. 39 at 2.)

E. Viewing the trial evidence in the light most favorable to the Government, there was evidence that petitioner and defendant Sanders were partners who jointly operated an extensive network of adult cinemas, bookstores and distribution warehouses. Defendant Sanders and all other defendants, with the exception of petitioner, were shown to have authorized the shipment of 871 8mm films which culminated in the indictment at bar. There was no evidence that petitioner had ever seen these films or had any knowledge of their nature, character or contents. There was no evidence petitioner exercised any role in the business within either two months before or after the shipment of film. Finally, there was no evidence that any other shipment made by the business contained obscene material.

F. Petitioner proffered at least five jury instructions which sought to have the term "average person" in the obscenity formulation defined as "average adult." (C.T. Vol. 2, Doc. 45). For example, proposed instruction No. 22 read in pertinent part:

> "The term 'average adult person' as used in these instructions is a hypothetical composite person who typifies the entire community including persons of both sexes . . . .

> " 'Adult' means all persons of age of 18 or older."

The trial judge refused to give a charge defining "person" as "adult." The court likewise declined petitioner's proffered instruction No. 48 that if "the jury is unable to ascertain the meaning of 'the average adult person,' or of 'contemporary community standards' . . . then the Government has failed to prove its case beyond a reasonable doubt." Petitioner had sought to develop on cross-examination of the Government's expert witness that certain terms used in the obscenity test, such as "the average person," were incapable of ascertainment. It was suggested that because that term is in the singular and includes men *and* women, then of necessity "the average person" must be a transsexual.

Petitioner asked the court to give the following instruction:

> "The predominant appeal to prurient interest is judged with reference to average adults unless it appears from the nature of the matter or the circumstances of its dissemination, distribution or exhibition, that it is designed for clearly defined deviant sexual groups, in which case the predominant appeal of the matter shall be judged with reference to its intended recipient group." (C.T. Vol. 2, Doc. 45, No. 28.)

Instead, the court delivered this charge:

> "In addition to considering the average or normal person, the prurient appeal requirement may also be assessed in terms of the sexual interest of a clearly defined deviant sexual group if you find, *beyond a reasonable doubt,* that the material was intended to appeal to the prurient interest

of such a group as, for example, homosexuals." (Emphasis added.) (R.T. Vol. 11 at G-215, G-216.)

G. Trial commenced on August 10, 1977, and on August 19, 1977, the jury rendered a verdict finding petitioner guilty on all eleven counts. (R.T. Vol. 11 at G-231.) On October 21, 1977, the Honorable Wm. Terrell Hodges, United States District Judge, after denying petitioner's motions for a new trial and for judgment of acquittal, sentenced petitioner to concurrent three year terms of imprisonment on all counts. That same day petitioner filed a timely Notice of Appeal (C.T. Vol. 2, Doc. 59) and was allowed to remain on $25,000 corporate surety bail pending the outcome of his appeal. Petitioner duly filed his appellate briefs in the Court of Appeals. The judgment of the District Court was affirmed on April 2, 1979. A timely petition for rehearing with suggestion for determination en banc was denied on June 15, 1979. An order staying the issuance of the mandate was granted on June 22, 1979, provided a petition for writ of certiorari was filed in the clerk's office of this Court on or before July 15, 1979. A timely petition for a writ of certiorari was filed on July 16, 1979, and on October 15, 1979, the petition was granted.

Summary of the Argument.

The FBI's acceptance from a third party of films wrongfully within that party's possession was a "seizure" subject to the warrant requirement of the Fourth Amendment. Alternatively, the rule fashioned in *Burdeau v. McDowell,* 256 U.S. 465, fifty years ago requires a two-step analysis of the "seizure"—that by the third party and that of the government—where First Amendment concerns are involved as has been held by

the Eighth Circuit but not by the Fifth or Ninth Circuits. Developments in Fourth Amendment doctrine and expanding concepts of privacy have undercut the practical function of *Burdeau.* To hold otherwise would allow Government sanctioned private censorship without judicial supervision and present problems of prior restraint.

The FBI's screening after a two-month hiatus of films received from a third party who had not viewed the films constituted both a "secondary search" subject to the warrant requirement of the Fourth Amendment as had been held in *United States v. Haes,* 551 F.2d 767 (8th Cir. 1977) as well as a "search" within the teaching of *United States v. Chadwick,* 433 U.S. 1. The films could not be seen with the naked eye and gave no surface indication of their contents. Hence the viewing of the films was a "search." Moreover, the two-month hiatus from the time the FBI acquired the films to the time it screened them was more egregious than the one-hour delay in conducting a search in *Chadwick.* Also *Chadwick* did not involve presumptively protected material.

The Government by appropriating presumptively protected First Amendment material received from a third party for one and one-half years without requesting a judicial determination of the obscenity *vel non* of said material committed a prior restraint the penalty for which is suppression of the material's use in a criminal trial in accordance with the provisions of the First, Fourth and Fifth Amendments to the Constitution and the interpretive decisions of this Court. The Government violated its own directives regarding the seizure of press materials. The circumstances of

the seizure were shocking to the conscience and constituted a deliberate attempt permanently to remove press materials from the eye of the public.

In an obscenity prosecution derivative proof of scienter solely through evidence of petitioner's participation in a management role in a presumptively legal business venture which shipped numerous films, and without any further proof that he knew of or authorized the solitary shipment of films charged as being obscene, deprived petitioner of freedom of speech and press and due process of law, contrary to the provisions of the First and Fifth Amendments to the Constitution and the interpretive decisions of this Court. *Hamling v. United States,* 418 U.S. 87, 123 requires proof that a defendant knew "the contents, character and nature" of the subject films. Petitioner never saw the films and was not proved to have knowingly transported these films either interstate or by means of a common carrier.

In an obscenity prosecution the refusal of the district court to instruct the jury that in calculating the mores of the community the term "average person" means "average adult" violated the teaching of *Pinkus v. United States,* 436 U.S. 293, that the community includes all adults who comprise it since "person" subsumes the class "children" and the instruction therefore deprived petitioner of freedom of speech and press and due process of law, contrary to the provisions of the First and Fifth Amendments to the Constitution. Even if it could be said that the jury could have concluded that "person" meant "adult," it cannot be certain that this is what it did do since the verdict was a general one.

In an obscenity prosecution involving films of an exclusively homosexual orientation an instruction foreclosing jury assessment of the prurient appeal, if any, of the films to homosexuals absent proof *beyond a reasonable doubt* that the films were intended to appeal to the prurient interest of homosexuals deprived petitioner of freedom of speech and press and due process of law, contrary to the provisions of the First and Fifth Amendments to the Constitution and the interpretive decisions of this Court. Whether the maker of the films intended them to appeal to the prurient interest of homosexuals is not only irrelevant but impossible to ascertain. Also the consequence of requiring proof of intent beyond a reasonable doubt was to unconstitutionally shift the burden of persuasion to petitioner.

A juror who read a book and frequently stared at the floor on the sole occasion when the allegedly obscene films were screened for the jury was either incompetent to render a judgment regarding the obscenity *vel non* of the films which must be *"taken as a whole"* under the directive of *Miller v. California,* 413 U.S. 15, or so prejudiced against the defense that petitioner was deprived of freedom of speech and press, due process of law, and an impartial jury, contrary to the provisions of the First, Fifth and Sixth Amendments to the Constitution.

In an obscenity prosecution involving films of an exclusively homosexual orientation the refusal of the district court to *voir dire* the veniremen concerning their length of residence in the community, participation in community organizations, knowledge of community standards from the standpoint of personal exposure, knowledge of the mores, customs and practices of the

homosexual community and opinion whether sexually explicit matter causes harm negated the mandate of *Smith v. United States*, 431 U.S. 291, that a defendant be given reasonable latitude in presenting *voir dire* questions to the veniremen and, accordingly, deprived petitioner of freedom of speech and press and due process of law, contrary to the provisions of the First and Fifth Amendments to the Constitution.

Due process of law under the Fifth Amendment required that petitioner's case be severed from co-defendant Sanders' so that co-defendant Grassi, who had entered a guilty plea during trial, could testify to exculpate petitioner and inculpate Sanders on the scienter issue, which Grassi had indicated he would do but not unless there were a severance since his former attorney was counsel for co-defendant Sanders and could impeach Grassi with other crimes Grassi had confidentially communicated to him if Grassi waived his attorney-client privilege and testified in favor of petitioner and against co-defendant Sanders. Additionally, Sanders was the subject of much adverse pretrial publicity and was represented by an attorney who had instructed a prosecution witness to "take the Fifth Amendment" and who wrote a letter which the Government introduced at trial and contended was false.

The refusal of the district court to give petitioner's proffered jury instruction on his theory of the case developed through cross-examination that certain terms in the obscenity formulation were incapable of calculation deprived petitioner of freedom of speech and press and due process of law, contrary to the provisions of the First and Fifth Amendments to the Constitution and the interpretive decisions of this Court. At trial

during cross-examination even the prosecution expert conceded that the term "the average person" was confusing. Petitioner sought to show that because that term is framed in the singular and includes both men and women, then of necessity "the average person" must be a transsexual.

ARGUMENT.

I.

The FBI's Acceptance From a Third Party of Films Wrongfully Within That Party's Possession Was a "Seizure" Subject to the Warrant Requirement of the Fourth Amendment, or Alternatively, the Rule Fashioned in Burdeau v. McDowell, 256 U.S. 465, Fifty Years Ago Requires a Two-Step Analysis of the "Seizure"—That by the Third Party and That of the Government—Where First Amendment Concerns Are Involved as Has Been Held by the Eighth Circuit but Not by the Fifth or Ninth Circuits.

More than fifty years ago in *Burdeau v. McDowell,* 256 U.S. 465, 475, the Supreme Court held "that papers stolen by a thief and turned over to the government could be used as evidence at trial. The Court did not explicitly consider whether the government's acceptance of the papers was a seizure."[3] However, when First Amendment concerns are at stake "the most scrupulous exactitude" must be given the constitutional requirements of the Fourth Amendment. *Stanford v. Texas,* 379 U.S. 476, 485. The First Amendment operates as an independent source of restrictions upon the power of the police to take expressive material since a prompt judicial determination in an adversary setting is mandated to obviate prior restraint problems. *Heller v. New York,* 413 U.S. 483, 495. Where, as here, the government acquires films which are the product of a third party search and fails to observe the minimum procedural safeguards prescribed by the Supreme Court the acquisition must be deemed a "seizure" both because it is a deprivation of a legitimate property interest (See *Rakas v. Illinois,* 439 U.S. 128) and because it operates as a prior restraint which upsets reasonable expectations that the property would be subject to prompt judicial return (*Heller, supra*) or would remain private. In short, where First Amendment concerns are involved a two-step analysis of the "seizure" must be made—that by the third party and that of the government—and *Burdeau* applies only in the absence of an independent governmental invasion of privacy rights protected by the Fourth Amendment. The majority opinion of the Circuit panel failed to discuss this issue.

[3]Dissenting opinion of Judge Wisdom at Pet. App. A-29.

As Judge Wisdom's dissent incisively demonstrated, the *Burdeau* rule is an anachronism discredited by commentators.[4] Its functional twin the "silver platter" doctrine was discarded nearly twenty years ago. *Elkins v. United States,* 365 U.S. 206. Developments in Fourth Amendment doctrine have undercut the practical function of *Burdeau* which was decided when there were few justifications for warrantless seizures. Today our society is expanding, not contracting, its legitimate expectations of privacy. Although *Rakas v. Illinois,* 439 U.S. 128, disapproves "arcane distinctions developed in property . . . law," under *Burdeau* a "seizure" is determined by the *status* of the trespasser—official versus private. It is difficult, if not impossible, to

[4]See, *e.g.,* Note, *Private Searches and Seizures,* 90 Harv. L. Rev. 463 (1976); Note, *The Fourth Amendment Right of Privacy: Mapping the Future,* 53 Va. L. Rev. 1314, 1336-59 (1969); Note, *Seizures by Private Parties: Exclusion in Criminal Cases,* 19 Stan. L. Rev. 608 (1967). *Burdeau* has also been criticized by some state tribunals. See, *e.g., State v. Helfrich,* ..... Mont. ....., 26 Cr. L. 2092 (1979), citing *State v. Brecht,* 485 P.2d 47 (1971); *Williams v. Williams,* 8 Ohio Misc. 156, 221 N.E.2d 622 (1966).

reconcile *Burdeau* with *Shelley v. Kraemer,* 344 U.S. 1 (1948) which held the "state action" doctrine forbids judicial support of certain private acts which, if carried out by the government would be unconstitutional. In sum, some flexibility in *Burdeau* is required to accommodate reasonable modern expectations of privacy, particularly where they intersect First Amendment values.

The Eighth Circuit in *United States v. Kelly,* 529 F.2d 1365 (8th Cir. 1976) concluded that where a common carrier delivers to the government First Amendment materials uncovered during a private search, the government's acceptance of said items constitutes a "seizure" requiring a warrant. The majority of the panel refused to follow *Kelly* and instead erroneously followed *United States v. Sherwin,* 539 F.2d 1 (9th Cir. 1976) (en banc) which concluded under similar facts that there was no "seizure." The brilliant dissenting opinion of Judge Wisdom and Note, *Private Searches and Seizures, United States v. Kelly and United States v. Sherwin,* 90 Harv. L. Rev. 463 (1976) both comprehensively analyze these two cases and conclude without reservation that the approach of *Kelly* is preferable to that of *Sherwin* in accommodating both First Amendment rights and the privacy interests of absent third parties.

A. Every action undertaken by the shippers of the films was consistent with an expectation of privacy. The twelve boxes of film were double-wrapped and reinforced to prevent accidental breakage while in transit. *Previous shipments* of film directed to "Leggs, Inc." on a "Will Call" basis *had not been reforwarded* to a Greyhound substation and *L'Eggs Products, Inc. had not been contacted.* It was reasonable to expect that no one would both claim shipped packages which did

not belong to them and then pay the collect charges on those items. Moreover, it was reasonable to assume that Greyhound would not release the shipped cartons to someone who claimed no interest in them and refused to pay the collect shipping charges due. The employment of a fictitious name on the shipment bills of lading was an earnest attempt to ensure privacy since common carrier pilferage or breakage occurs frequently, as several witnesses testified, when the name of a known adult entertainment business is used on the bill of lading.[5] Also the assiduous attempts of the shippers to locate their misdirected shipment is demonstrative of their expectation that the merchandise would remain private. Finally, where the "contraband" involved is 8mm films—the indictment did not charge the film box covers with being obscene—the expectation of privacy is at its greatest since (1) the films are presumed legitimate in the absence of a judicial determination to the contrary and (2) *the film frames are too small to be seen without the aid of a projector. Roaden v. Kentucky,* 413 U.S. 496; *Lee Art Theatre, Inc. v. Virginia,* 392 U.S. 636. In fact, the FBI chose not to screen the films for *two months* after their seizure, although they knew appellants were seeking to retrieve their merchandise and even then maintained a reasonable expectation that the films would remain private and would not be viewed by others. See *United States v. Haes,* 551 F.2d 767 (8th Cir. 1977); *United States v. Kelly,* 529 F.2d 1365, 1368 (8th Cir. 1976).

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[5]Within a two month period one adult bookstore had *seven* separate interstate shipments addressed to it as consignee rip open "inadvertently." *United States v. Kelly,* 529 F.2d 1365, 1368 (8th Cir. 1976).

B. The government, relying heavily on *United States v. Sherwin,* 539 F.2d 1 (9th Cir. 1976) (en banc) has contended that its acquisition of the films in issue did not fall within the scope of the Fourth Amendment since there is no "seizure" if property is consensually transferred by a third party to the government. Alternatively, the government advanced the third party consent exemption to the warrant requirement of the Fourth Amendment as justification for its seizure of the films. Neither theory has factual underpinning.

Admittedly, employees of L'Eggs Products, Inc. (LPI) voluntarily contacted the FBI to inquire as to what they should do with the misdirected shipment of films in their possession. FBI Agent Mandyck, knowing the shipment was "misdirected" and, accordingly, not rightfully within the possession of LPI, *instructed* LPI to secure the films in a safe place until the FBI could come by and pick them up. (R.T. Vol. 1 Supp. at 170-71, 107, 133.) However, a "seizure" is not complete until there is an effective appropriation (*Lustig v. United States,* 338 U.S. 74, 78) and the FBI waited five days to appropriate the films. During this hiatus, LPI denied having the films to defendant Grassi, thereby demonstrating their subservience to the government. (R.T. Vol. 4 Supp. at 8-9.) Also Greyhound employee Askew testified he did not tell defendants the whereabouts of the films *per FBI instructions* and Agent Mandyck admitted telling Askew to get the names and phone numbers of those seeking to retrieve the films. (R.T. Vol. 1 Supp. at 50-52, 207-08.) The only rational conclusion that may be drawn from the aforesaid facts is that LPI and Greyhound employees were not acting voluntarily but rather

under the command and at the direction of the FBI and that the FBI, knowing the films were wrongfully acquired by LPI, participated in and encouraged their theft. It is only "[w]here no official of the federal government has any connection with a wrongful seizure or any knowledge of it until after the fact, [that] evidence is admissible." *United States v. Mekjian,* 505 F.2d 1320 at 1327 (5th Cir. 1975). Thus, there was neither a voluntary relinquishment of the films to the FBI nor was there an absence of governmental participation in an illegal seizure.

The government's suggestion that the FBI acquired the subject films pursuant to a valid third party consent is unsupportable. LPI employees admitted LPI had no entitlement to the packages, the films were taken without paying the freight charges and the cartons were not addressed to LPI. Moreover, Agent Mandyck knew the films were "misdelivered" and retained for five days by LPI while the defendants sought to regain their merchandise. Obviously, the actions of defendants in attempting to retrieve their films were indicative of the fact that *no consent* had been given to LPI to relinquish the films to the FBI. Indeed, if LPI had authority over the films it was clearly lost during the five day interval between the time the FBI was contacted and the time it picked up the films.

C. The majority opinion claims that the acquisition of the twelve cartons of film by the FBI from LPI was not a "seizure" under the holding of *Sherwin, supra,* since it was the product of a voluntary relinquishment. This holding of *Sherwin* is not without detractors. *McSurely v. McClellan,* 553 F.2d 1277 (D.C. Cir. 1976) (en banc); *United States v. Kelly,* 529 F.2d 1365 (8th Cir. 1976); *United States v.*

Haes, 551 F.2d 767 (8th Cir. 1977); *Private Searches and Seizures: United States v. Kelly and United States v. Sherwin*, 90 Harv. L. Rev. 463 (1976).

"Placing the Government's acceptance of printed materials outside Fourth Amendment constraints allows for the possibility of Government sanctioned private censorship without judicial supervision," "might deter the dissemination of legitimate expression via interstate common carriers," and "presents a problem of prior restraint." 90 Harv. L. Rev. at 467. All of the concerns expressed above were set in motion in the case at bar when LPI turned over to the FBI the cartons of film it wrongfully withheld from defendants. "Cooperation of a custodian without authority to grant access may obviate use of force, but it does not validate an otherwise unlawful search and seizure." *McSurely v. McClellan*, 553 F.2d 1277, 1291 (D.C. Cir. 1976) (en banc).

The Harvard Law Review article in finding the approach of *Kelly* preferable to that of *Sherwin* criticizes the absolutist scope of the *Burdeau v. McDowell* exemption, concluding that developments in Fourth Amendment doctrine have undercut the practical function of *Burdeau*. Furthermore, the article characterizes the government's conduct in *Kelly* and *Sherwin* as a "seizure" because it constituted a deprivation of the defendants' property interests. These property interests help define the scope of the right to privacy and must be presumed legitimate where First Amendment material is involved. Accordingly, the government's appropriations in *Kelly*, *Sherwin* and the case at bar were "seizures." 90 Harv. L. Rev. at 467-72.

II.

The FBI's Screening After a Two-Month Hiatus of Films Received From a Third Party Who Had Not Viewed the Films Constituted Both a "Secondary Search" Subject to the Warrant Requirement of the Fourth Amendment as Had Been Held in a Similar Case by the Eighth Circuit as Well as a "Search" Within the Teaching of United States v. Chadwick, 433 U.S. 1.

After obtaining the subject 8mm films from L'Eggs Products, the FBI waited two months to screen the films to ascertain what they had. The individual frames of 8mm film were too small to be seen with the naked eye. Although the box covers for the films purported to describe in graphic fashion the content of the respective films, the box covers were entitled to a presumption of non-obscenity (*Roaden v. Kentucky*, 413 U.S. 496), were never charged as being obscene and, moreover, did not present probable cause for the issuance of a warrant. *United States v. Tupler*, 564 F.2d 1294 (9th Cir. 1977).

In *United States v. Haes*, 551 F.2d 767 (8th Cir. 1977), the FBI, having been contacted by a common carrier who had discovered sexually explicit films and having brought a projector to the common carrier's office where they screened the flms without first obtaining a warrant, was held to have conducted a separate, independent search which was illegal since no exception to the warrant requirement existed. The majority opinion of the panel purports to distinguish *Haes* by declaring that L'Eggs employees had fully ascertained the nature of the *films even though they had never screened them*. Therefore, the majority concludes, "the FBI's subsequent viewing of the movies on a projector did

not 'change the nature of the search' and was not an additional search subject ot the warrant requirement." It is obvious that the FBI both changed the nature of the search and conducted an additional search when they projected films that had never been viewed by L'Eggs employees. *A fortiori*, the two-month hiatus between acquisition and screening negated the possibility that one continuous search transpired.

The majority opinion also attempts to distinguish *United States v. Chadwick*, 433 U.S. 1 (1977) by declaring that "the FBI took control of property that had already been searched by a private party and did not conduct any additional search of its own requiring a warrant." This argument is flawed for the same reasons set forth above. Moreover, this interpretation of *Chadwick* would emasculate the decision. In *Chadwick* a *one-hour* delay in conducting a warrantless search of a footlocker for drugs was held to be too long. *Cf. Arkansas v. Sanders*, ... U.S. ....., 99 S.Ct. 2586. How can it possibly be said that a *two month* delay in conducting a warrantless search of presumptively protected First Amendment material was not too long?

A. Assuming, *arguendo*, that LPI validly consented to the FBI's *seizure* of the subject films, there was no consent to the FBI's *search* of the films which occurred when they were screened two months later. Neither the FBI nor anyone at LPI knew the contents of the films since the 8mm film frames were too small to be seen with the naked eye (see R.T. Vol. 1 Supp. at 65, 119, 137, 155 and Vol. 7 at C-133 to C-137).[6] Accordingly, the nature and content of the

[6]8mm film is eight (8) millimeters in width. Excluding three (3) millimeters for sprocketing and one (1) millimeter for the border, the film is contained within a four (4) millimeter frame. This frame is less than 0.16 inch wide and the scenes depicted within the frame are necessarily much more minute. It is therefore understandable that such films cannot be examined with the naked eye.

subject films were unknown until they were screened approximately two months after the FBI appropriated them.

In addition to not being charged as being obscene, the film box covers did not present probable cause for one to entertain the belief that the films were obscene. *United States v. Tupler*, 564 F.2d 1294, 1297-98 (9th Cir. 1977). However, during the two-month period prior to the screening of the films the FBI was cognizant that defendants were seeking the return of their films. Accordingly, any *imputed* consent must be deemed *revoked*. *Mason v. Pulliam*, 557 F.2d 426 (5th Cir. 1977) (taxpayer who consented to IRS possession of his papers for examination may withdraw his consent and reinvoke his Fourth Amendment rights as to all papers not then viewed or copied). Employing the logic of *Mason* to the case at bar it is clear the FBI viewed the films without the petitioners' consent and that search is properly a subject of suppression.

B. If the government undertakes any new or different searches after being apprised that contraband has been unearthed in a private search, then a warrant is required unless an exception to the warrant requirement exists. *United States v. Haes*, 551 F.2d 767, 771 (8th Cir. 1977).

The opening of the film boxes by FBI agents and their unsuccessful attempt to "eye view" the contents of one of the 871 films at LPI places the government outside the scope of *Sherwin*, since there "[w]hen the agents arrived they did not conduct a more extensive search." *Sherwin, supra*, at 6-7. There is only *one*

chance in 871 that the FBI did not conduct a more extensive search. Those are the odds against the FBI selecting the same film to "eye view" as did LPI employee Shults. Moreover, only five of the 25 different film titles were charged with being obscene. There was only a 20 percent chance that a charged film was "eye viewed."

C. The FBI's subsequent screening of films it received from LPI constituted a "search" prohibited in the absence of a warrant by the Fourth Amendment. Common sense dictates that this be so. Until the films were projected on a screen there was *no probable cause* to believe a crime had been committed,[7] so how could the viewing of the films not be a "search"?

In both *United States v. Sherwin*, 539 F.2d 1 (9th Cir. 1976) (en banc) and *United States v. Kelly*, 529 F.2d 1365 (8th Cir. 1976) FBI agents simply reinspected magazines and books which had already been examined by freight agents. Significantly, in the case at bar the film box covers were not charged with being obscene and the film could not be "eye viewed." Therefore the FBI, unlike the situation in *Sherwin* and *Kelly*, was unable to judge the material either taken as a whole or at all for that matter. In screening the films the FBI engaged in a secondary search similar to the one condemned in *United States v. Haes*, 551 F.2d 767, 771 (8th Cir. 1977). If anything, however, the instant search was more unreasonable since the Government never attempted to obtain

[7]The box covers for the film were entitled to a presumption of non-obscenity (*Roaden v. Kentucky*, 413 U.S. 496), were not charged as being obscene and did not present probable cause for the issuance of a warrant. (*United States v. Tupler*, 564 F.2d 1294 (9th Cir. 1977).) The film itself could not be seen with the naked eye.

a warrant, conceded there were no exigent circumstances, held the films for two months before viewing them and confessed that a warrant could have been obtained had one been sought.

Even if *Sherwin* is accepted as the controlling authority on the "seizure" issue, it does not mean the FBI's subsequent screening of the films was not a "search" governed by the Fourth Amendment. More exacting standards apply to searches and seizures of First Amendment-protected materials than to narcotics, gambling paraphernalia and other contraband. *Roaden v. Kentucky* 413 U.S. 496; *Stanford v. Texas*, 379 U.S. 476; *A Quantity of Books v. Kansas*, 378 U.S. 205. Also Fourth Amendment "search" and "seizure" issues are appropriately subjected to bifurcation. For example, in *United States v. Chadwick*, 433 U.S. 1 government agents had probable cause to believe defendants' footlocker contained contraband and, accordingly, they seized it at the time they arrested the defendants, but delayed their search of the luggage for *one hour* after the seizure. Since the police seizure was incident to an arrest it was exempt from the Fourth Amendment warrant requirement. The delayed warrantless search of the footlocker, however, did not fall within the compass of any recognized exception to the warrant requirement and was held constitutionally defective.

The lesson of *Chadwick* is instructive in the instant case. A sealed box of film is like a sealed trunk. It is immaterial that a Government acquisition be deemed a voluntary relinquishment or a consent seizure or a seizure incident to arrest, in all cases a warrant to seize is not mandated. But a warrantless search of the acquired items which contain potential contra-

band may not be delayed unless a search warrant is first obtained. In postponing their search of the subject films for two months, the FBI lost any possible exemption from the search warrant requirement of the Fourth Amendment it might have asserted. Therefore the search was illegal.

III.

The Government by Appropriating Presumptively Protected First Amendment Material Received From a Third Party for One and One-Half Years Without Requesting a Judicial Determination of the Obscenity Vel Non of Said Material Committed a Prior Restraint the Penalty for Which Is Suppression of the Materials' Use in a Criminal Trial in Accordance With the Provisions of the First, Fourth and Fifth Amendments to the Constitution and the Interpretive Decisions of This Court.

Since 1931 when in *Near v. Minnesota*, 283 U.S. 697, this Court first undertook to clarify the doctrine of prior restraint and made it a touchstone of the First Amendment, this Court has reaffirmed and explained the doctrine in a plethora of cases that restrict the Government's possession of another's First Amendment materials to situations where a prompt adversary hearing is available so that prior restraint will not occur. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546; *Roaden v. Kentucky*, 413 U.S. 496; *Heller v. New York*, 413 U.S. 483; *Blount v. Rizzi*, 400 U.S. 410; *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636; *Freedman v. Maryland*, 380 U.S. 51; *Stanford v. Texas*, 379 U.S. 476; *A Quantity of Books v. Kansas*, 378 U.S. 205; *Marcus v. Search Warrant*, 367 U.S. 717; *Speiser v. Randall*, 357 U.S. 513. The chilling effect exerted by a prior restraint of expressive

material was amply discussed in these cases and does not require reiteration here. What must be addressed, however, is whether, in the absence of a Fourth Amendment violation, the violation of the First Amendment prior restraint doctrine requires at least under some circumstances the exclusion of the appropriated expressive materials from evidence in an attendant criminal trial. Although this question before now has never been considered, its answer must be in the affirmative to avoid a total abridgement of the First Amendment.

The Department of Justice long has recognized the potential for exclusion of evidence under the doctrine of prior restraint where there is a seizure of more than a representative sample of suspect material. In their "Handbook for Federal Obscenity Prosecutions," published by its Administrative Regulations Section of the Criminal Division, in June, 1972, it is stated:

> "That is to say, if the defendant has 5,000 copies and we seize 10 for evidentiary purposes, the rule of reason would seem to have been met. If, however, he has 11 copies and we seize 10 perhaps we would be open to criticism. Thus, any seizure of presumptively protected materials in the absence of an adversary hearing, should be limited to the smallest possible number for use as criminal evidence, but probably in no case should the number exceed 8 or 10. We must at all times maintain the position that it is *evidence* we are seeking to obtain, and not solely the *destruction* of the books as our ultimate objective.
>
> "The foregoing general policy statement would thus be applicable in situations involving in transit breakage of parcels containing obscene materials,

whether such breakage occurred during the course of transmission by a common carrier or in the United States mail stream. If the rule of reason is followed, the seizure would probably be sustained." (C.T. Vol. 1, Doc. 18 at 11-12.)

Although the Government directive speaks of a "rule of reason", it obviously was not followed since the seizure herein was massive and the holding period was one and one-half years. If "(t)he primary justification for the exclusionary rule is the deterrence of police conduct,"[8] then surely the Government's own promulgation offered *no* deterrence to such conduct. Something more is obviously required, something with teeth to guard against wholesale disregard of First Amendment rights. What is called for is an exclusionary rule which balances the individual's and the public's interest in the expressive material against governmental concerns. Obviously, factors such as the length of time the material is withheld from the public, the nature of the appropriation, whether the victim of the seizure was given notice,[9] and others will be significant.

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[8]*Stone v. Powell,* 428 U.S. 465, 486; *Cf.* Thomas S. Schrock and Robert C. Welsh, "Up From Calandra; The Exclusionary Rule as a Constitutional Requirement," 59 Minn. L. Rev. 251 (1974).

[9]*Fuentes v. Shevin,* 407 U.S. 67, summarizes the essence of procedural due process. The Court said:

> "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' It is equally fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner.'" *Id.* at 80.

Moreover, an individual should have a duty to demand the return of his property only when it was seized pursuant to warrant since under those circumstances the judicial process

The idea underlying the development of an exclusionary rule in the area of First Amendment evidence is not novel, but it is necessary. See Peter E. Quint, "Toward First Amendment Limitations on the Introduction of Evidence: The Problem of *United States v. Rosenberg,*" 86 Yale L.J. 1622 (1977); Henry P. Monaghan, "First Amendment 'Due Process,'" 83 Harv. L. Rev. 518 (1970).

In its second opinion filed June 15, 1979, the majority of the panel cite a number of lower court decisions which hold that when materials are seized in violation of the First Amendment, the appropriate remedy is return of the seized property, but not its suppression as evidence at trial. The cases cited involve the seizure, for but a brief period, of expressive matter pursuant to warrant but without an adversary hearing. Clearly the case at bar is distinguishable from these cases not only in that no warrant was involved but also importantly, in that the government held the appropriated materials for one and one-half years before an indictment was returned. In footnote seven of his dissent Judge Wisdom suggests that "*Heller* and *Roaden* may obliterate any distinction between violations of the First and Fourth Amendments when a seizure of expressive matter is defective for lack of a determination of probable obscenity by a neutral magistrate."

It also appears that no court has ever considered whether suppression of evidence is an appropriate remedy for a prior restraint under the Due Process Clause of the Fifth Amendment. Yet this Court in *United*

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is involved. When there has been a warrantless seizure of expressive material such as in the case at bar, the judicial process has not been involved and it would stretch the First Amendment beyond the breaking point to require the aggrieved party to be the one required to seek a hearing.

States v. Russell, 411 U.S. 423, 431-32, stated, "[W]e may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, *cf. Rochin v. California,* 342 U.S. 165 (1952). . . ." It is submitted that the massive nature of the seizure herein (871 films were taken), the fact only five of the twenty-five film titles were ever charged with being obscene, the government's knowledge that defendants were seeking return of their property, the failure of the government to give either direct notice to petitioner that it had his property if he wished to claim it or to place a notice of seizure in a newspaper of general circulation (*cf. Sniadach v. Family Finance Corporation,* 395 U.S. 337; *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306), and the government's failure to seek an obscenity *vel non* determination from a neutral magistrate during a two-year period manifest the government's intention to impose nonjudicial suppression of a citizen's presumptively protected First Amendment property without affording the citizen the niceties of procedural due process. The result, particularly when coupled with First and Fourth Amendment considerations earlier addressed, is shocking to the conscience and in violation of due process under the Fifth Amendment. The suppression of the appropriated films as evidence is a just and proper remedy under the circumstances of this case.

IV.

In an Obscenity Prosecution Derivative Proof of Scienter Solely Through Evidence of Petitioner's Participation in a Management Role in a Presumptively Legal Business Venture Which Shipped Numerous Films, and Without Any Further Proof That He Knew of or Authorized the Solitary Shipment of Films Charged as Being Obscene, Deprived Petitioner of Freedom of Speech and Press and Due Process of Law, Contrary to the Provisions of the First and Fifth Amendments to the Constitution and the Interpretive Decisions of This Court.

The Fifth Circuit's opinion concludes that "[g]iven the . . . testimony describing Walter's central role in the management of . . . companies involved in the distribution and sale of hardcore pornography, . . . he possessed the requisite scienter (Pet. App. A-15)."[10] The Circuit thus erroneously equates an individual's *agreement* to participate in a presumptively legal business venture with guilty *knowledge* of a solitary criminal violation occurring in the course of the operation of that business by others. "In general an individual defendant may be criminally liable on the basis of an act or omission of another person, only if it appears beyond reasonable doubt that he willfully ordered or directed, or willfully authorized or consented to, *the act* or omission *in question*." Devitt & Blackmar, *Federal Jury Practice and Instructions,* Vol. 1, Section 12.09 (1977) (Emphasis added). There is *no* evidence that petitioner ordered, directed, authorized or consent-

[10]Although the evidence demonstrated that petitioner Walter had a central role in the management of some companies which dealt in adult material, his role in the management of the two corporations charged in the indictment is not nearly as clear as the Court of Appeals would paint it. See, *e.g.,* Motion for Judgment of Acquittal (C.T. Vol. 2, Doc. 50 at 17-21).

ed to "the act in question" (the September 25, 1975, interstate shipment of allegedly obscene films) since all evidence touching upon him dealt with time frames either *two months before or two months after* the shipment date. Instead the evidence shows other defendants directed the shipment in question.

The evidence at trial and as recounted in the panel's opinion shows at most petitioner's involvement in a legal enterprise which dealt in all situations except the one at bar in material presumptively protected by the First Amendment.[11] *Roaden v. Kentucky,* 413 U.S. 496. It strains credulity to suggest this evidence and nothing more proved beyond a reasonable doubt that on September 25, 1975, petitioner: (1) Knew "the contents, character and nature" of the subject films he was never shown to have seen (*Hamling v. United States,* 418 U.S. 87, 123); (2) Knowingly used a common carrier to ship these obscene materials

[11]It is patent that in calculating whether obscenity exists the material must be taken as a whole (*Miller v. California,* 413 U.S. 15) and an individual's subjective belief in the obscenity of material is irrelevant. *Clicque v. United States,* 514 F.2d 923 (5th Cir. 1975). The recitation of testimony relating to the contents of warehouses and bookstores is irrelevant since such material cannot be seen as a whole (*United States v. Tupler,* 564 F.2d 1294 (9th Cir. 1977)), nor can it be known to have traveled in interstate commerce at the direction of petitioner herein, nor can it be known whether said material is hard-core or soft-core. Indeed, under the law it must be presumed that such material is *not* obscene. *Roaden v. Kentucky,* 413 U.S. 496. Accordingly, there can be *no conspiracy with regard to such material not before the court* since a conspiracy involves an agreement to commit an illegal act, and there is nothing illegal about material presumptively protected by the First Amendment. Therefore, the conspiracy charge as to petitioner (and, of course, as to the other defendants) rises or falls on whether he (or they) can be tied to the September 25, 1975, shipment of twelve cartons of films, which is the only "object" of the conspiracy it is permissible to consider.

interstate; and (3) Knowingly transported these obscene materials interstate for the purpose of sale or distribution. The panel's determination that scienter in First Amendment cases may be proved derivatively by a pattern of non-criminal activity removed in time from the incident charged vitiates the scienter requirement spelled out by this Court. *Hamling, supra*; *Smith v. California,* 361 U.S. 147 (1959).

As *Hamling* elucidates, the scienter element in an obscenity prosecution requires proof beyond a reasonable doubt that a defendant had knowledge of "the contents, character and nature" of the charged material. In an attempt to skirt the mandate of *Hamling,* the Fifth Circuit, however, adopts by implication and without explication what appears to be both an analogue and an extension of what has been called the "willful blindness" exception to proof of knowledge.[12] Under the "willful blindness" concept a defendant's deliberate avoidance of learning the true criminal situation is presumed to be equivalent to knowledge when it is coupled with subjective awareness of the high probability of the fact in question.[13] The Fifth Circuit has

[12]The origin of "willful blindness" concept may be traced to the English case *R. v. Sleep,* 169 Eng. Rep. 1296, 1302 (C.C.R. 1861), although the term did not spring into usage until substantially later. *See, e.g.,* G. Williams, *Criminal Law,* Section 41, at 125 (1953). More recently, the concept has been found in our jurisprudence, principally in the arena of drug-related cases. *See, e.g., United States v. Valle-Valdez,* 554 F.2d 911 (9th Cir. 1977); *United States v. Murrieta-Bejarano,* 552 F.2d 1323 (9th Cir. 1977).

[13]The concept of "willful blindness" has been attacked justifiably by commentators as a retrenchment from the requirement of *In re Winship,* 397 U.S. 358, 364, that the Government prove guilt beyond a reasonable doubt by demonstrating beyond reasonable doubt *all* elements of the charge. See, *e.g.,* Comment, *Willful Blindness as a Substitute for Criminal Knowledge,* 63 Iowa L. Rev. 466 (1977). The "willful blind-

(This footnote is continued on next page)

taken the concept a step farther by finding knowledge in the absence of a showing of deliberate avoidance. In fact the record is devoid of evidence that petitioner Walter either saw the films or deliberately avoided seeing them. Also he neither knew nor deliberately avoided knowing the films were to be transported not only in interstate commerce but also by a common carrier. Equally significant is the Circuit panel's implicit finding in the face of a silent record that petitioner possessed a subjective awareness of the high probability that the films were obscene. Even had petitioner Walter seen the films, under Fifth Circuit authority an individual's subjective belief that material is obscene is irrelevant. *Clicque v. United States,* 514 F.2d 923 (5th Cir. 1975). Unlike gambling paraphernalia, drugs and other contraband, First Amendment materials are not amenable to the "subjective awareness" requirement of the "willful blindness" rationale.[14] Unlike ordinary contraband, unviewed films must be presumed non-obscene. *Roaden v. Kentucky,* 413 U.S. 496.

In sum, the evidence at best demonstrates petitioner participated in a management role in a presumptively legal business venture which shipped numerous films. There was no evidence, however, of any involvement by petitioner in that business during the two months before and the two months subsequent to the solitary

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ness" concept violates the rules of strict construction of a criminal statute, permits the courts to invade the province of the legislative body by redefining an element of a crime and violates the established principles governing the application of presumptions. *Id.* at 466-85.

[14]If anything, the specific intent element in obscenity prosecutions should be judged *strictissimi juris. Noto v. United States,* 367 U.S. 290, 299-300, *Hellman v. United States,* 298 F.2d 810 (9th Cir. 1961). See *Scales v. United States,* 367 U.S. 203, 232.

shipment of films charged as being obscene. Based upon such evidence, it is impossible to believe "*any* rational trier of fact could have found the essential elements of [scienter] beyond a reasonable doubt." *Jackson v. Virginia,* .... U.S. ...., ..., 99 S.Ct. 2781, 2789.

V.

In an Obscenity Prosecution the Refusal of the District Court to Instruct the Jury That in Calculating the Mores of the Community the Term "Average Person" Means "Average Adult" Violated the Teaching of Pinkus v. United States, 436 U.S. 293, That the Community Includes All Adults Who Comprise It Since "Person" Subsumes the Class "Children" and the Instruction Therefore Deprived Petitioner of Freedom of Speech and Press and Due Process of Law, Contrary to the Provisions of the First and Fifth Amendments to the Constitution.

Petitioner submitted as least five jury instructions seeking to have the court define "average person" as meaning "average adult." (See appendix and *supra,* at 14-15.) *Pinkus v. United States,* 436 U.S. 293 said the community includes all adults who comprise it and "it was error to instruct the jury that [children] were a part of the relevant community." By failing to instruct the jury to consider only "adults" in calculating the composition of the contemporary community, the trial judge left open for the jury's speculation whether "person" included "children."[15] Moreover, certain jurors

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[15]As used herein, the word "children" includes the entirety of the class of "pre-adult" persons. It is recognized that certain teenagers in one state may be classified by state law as adults while their counterparts in another state are not. This does not pose a problem since *Miller v. California,* 413 U.S. 15, determined that the contemporary community is a "local" one and therefore application of the local law regarding the age of majority is appropriate.

apparently believed minors were part of the relevant community. During *voir dire* one juror declared:

> "I have two teenage children coming up and they are faced with this type of thing on the streets every day. And it's . . . it's . . . to me very distasteful. And . . ." (R.T. Vol. 5 at A-85).

Subsequent attempts by the petitioner during *voir dire* to have the veniremen instructed that children were not involved in the case and that the material was not distributed to minors were rebuffed. (R.T. Vol. 5 at A-123, A-124.) Additionally, the court refused to ask the jury panel proffered *voir dire* questions on the point.[16]

Anyone who understands the English language recognizes that "children" are subsumed within the class "person." Accordingly, if the jury failed to include children as part of the contemporary community, they would have to have disobeyed the court's instructions. It is more likely than not that the jury followed the trial judge's directives. In doing so they necessarily considered "children" as part of the relevant community and thereby rendered a verdict which must be struck down for the reasons set forth by this Court in *Pinkus*.

The Circuit panel's opinion quotes from instructions using the words "average person" and "average and

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[16]Two examples are as follows:

"If the Court should advise you that the challenged materials must be measured by their impact on the average person and not by their impact on minors or young persons or particularly susceptible persons, would you be willing and able to follow the Court's instruction in that regard (C.T. Vol. 2, Doc. 46 at 11, No. 83)?"; and

"Do you presently have an opinion as to what materials adults should be allowed to see and read (C.T. Vol. 2, Doc. 46 at 15, No. 116)?"

normal attitude toward, and an average interest in, sex" and contends that these words limited consideration to adults. Pet. App. A-17. That is not the case, however. Taken in context what the quoted instructions did was to differentiate the non-deviant community from the deviant community. Moreover, even if the panel's viewpoint is accepted as correct, the instructions made it possible for the jury to conclude that the "average person" has some of the attributes of a child. This is exactly what was condemned in *Pinkus*.[17] More significantly, even if the jury could have concluded that "person" meant "adult," it cannot be certain that this is what it *did* do since its verdict was a general one. *Sandstrom v. Montana*, ... U.S. ...., 99 S.Ct. 2450.

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[17]This Court in *Pinkus* equated the average person in the relevant community with the arithmetic mean of the local adult population. The Fifth Circuit's assumption that the words "average . . . attitude . . . and . . . average interest in sex" found in the instructions directed jury consideration solely to the contemporary standards of this adult population is unwarranted. Said average attitudes and interests when not specifically restricted to adults are merely components of an "average person" who is the arithmetic mean of the combined local adult and child population. The whole is equal to the sum of its parts and no more. The "whole" as contemplated by the Fifth Circuit necessarily encompasses some of the attributes of a child.

VI.

In an Obscenity Prosecution Involving Films of an Exclusively Homosexual Orientation an Instruction Foreclosing Jury Assessment of the Prurient Appeal, if Any, of the Films to Homosexuals Absent Proof Beyond a Reasonable Doubt That the Films Were Intended to Appeal to the Prurient Interest of Homosexuals Deprived Petitioner of Freedom of Speech and Press and Due Process of Law Contrary to the Provisions of the First and Fifth Amendments to the Constitution and the Interpretive Decisions of This Court.

The opinion of the Fifth Circuit omitted entirely a discussion of the manifestly erroneous jury instruction which directed that prurient appeal be measured by the standards of the average person when the films were clearly directed to a deviant group. *A fortiori*, the instruction given precluded any consideration whether the films had a prurient appeal to members of the homosexual community.[18]

All the subject films depicted male homosexual conduct exclusively and it was undisputed that the *intended and probable* recipients of the films were homosexuals. The court, over objection, instructed in essence that prurient appeal is to be judged with reference to the average person instead of only to members of the intended deviant recipient group contrary to the teaching of *Mishkin v. New York*, 383 U.S. 501,

[18]No testimony was adduced during the trial to the effect that the charged films appealed to the prurient interest of homosexuals. In fact, the court denied petitioner's pre-trial motion to compel the prosecution to elect whether the alleged prurient appeal of the films was to average adults or tc members of the homosexual community. (C.T. Vol. 2, Doc. 42.)

and *Pinkus v. United States*, 436 U.S. 293 (error to include children as part of community for purposes of determining prurient appeal unless children shown to be intended and probable recipients). The court admonished the jury that *before* pruriency could be assessed in terms of sexual interest of the intended and probable recipients of the films, *i.e.*, homosexuals, there must be *proof beyond a reasonable doubt* that the films were "*intended to appeal to the prurient interest*" of homosexuals.[19] Whether the maker of the films *intended* them to appeal to the prurient interest of homosexuals is not only irrelevant but impossible to ascertain. Accordingly, since such an intent could not be proved beyond a reasonable doubt, the jury was foreclosed from assessing whether the films appealed to the prurient interest of members of the homosexual community. The consequence of requiring proof of intent beyond a reasonable doubt was to unconstitutionally shift the burden of persuasion to petitioner, a practice which was condemned in *Mullaney v. Wilbur*, 431 U.S. 684, 701-04. See *In re Winship*, 397 U.S. 358, 364.

[19]The court instructed as follows:

"In addition to considering the average or normal person, the prurient appeal requirement may also be assessed in terms of the sexual interest of a clearly defined sexual group if you find, beyond a reasonable doubt, that the material was intended to appeal to the prurient interest of such a group as, for example, homosexuals." (R.T. Vol. 11 at G-215, G-216.)

VII.

A Juror Who Read a Book and Frequently Stared at the Floor on the Sole Occasion When the Allegedly Obscene Films Were Screened for the Jury Was Either Incompetent to Render a Judgment Regarding the Obscenity Vel Non of the Films Which Must Be "Taken as a Whole" Under the Directive of Miller v. California, 413 U.S. 15, or so Prejudiced Against the Defense That Petitioner Was Deprived of Freedom of Speech and Press, Due Process of Law, and an Impartial Jury, Contrary to the Provisions of the First, Fifth and Sixth Amendments to the Constitution.

There is substantial evidence that Juror Kohring was reading a magazine and staring at the floor during much of the time when the five films in question were screened in court for the jury. It was the only occasion on which the jurors saw these films.

Under the facts presented a magistrate seeing only what Kohring saw would not have *probable cause* to issue a warrant to seize the film. *United States v. Tupler,* 564 F.2d 1294, 1297-98 (9th Cir. 1977). This is because *Miller v. California,* 413 U.S. 15, requires that a film be considered *as a whole* by the trier of fact charged with the application of the obscenity formulation. If Kohring did not have probable cause to believe the films obscene, then *a fortiori* he could not have found them obscene *beyond a reasonable doubt* and petitioner was deprived of his Fifth Amendment rights.

Juror Kohring was incompetent to render a judgment regarding the obscenity *vel non* of the films. Moreover, Kohring should have been replaced by an alternate

juror who was not so obviously *prejudiced* against the defense since petitioner was entitled under the Sixth Amendment to an *impartial* jury.

VIII.

In an Obscenity Prosecution Involving Films of an Exclusively Homosexual Orientation the Refusal of the District Court to Voir Dire the Veniremen Concerning Their Length of Residence in the Community, Participation in Community Organizations, Knowledge of Community Standards From the Standpoint of Personal Exposure, Knowledge of the Mores, Customs and Practices of the Homosexual Community and Opinion Whether Sexually Explicit Matter Causes Harm Negated the Mandate of Smith v. United States, 431 U.S. 291, That a Defendant Be Given Reasonable Latitude in Presenting Voir Dire Questions to the Veniremen and, Accordingly, Deprived Petitioner of Freedom of Speech and Press and Due Process of Law, Contrary to the Provisions of the First and Fifth Amendments to the Constitution.

The trial court erred in failing to ask the requested *voir dire* questions propounded by petitioner particularly as they related to the jurors' length of residence in the community, participation in community organizations, knowledge of community standards from the standpoint of personal exposure (this was particularly significant since comparison evidence was not allowed to be introduced), opinion as to whether sexually explicit matter causes harm, their knowledge of the mores, customs and practices of the homosexual community and their opinion whether sexually explicit matter causes

harm.[20] *Smith v. United States*, 431 U.S. 291, 308, mandates that a defendant be given reasonable latitude in presenting *voir dire* questions to the veniremen, but leaves the decision of the propriety of a particular question to the discretion of the trial court. It must be noted the trial herein occurred in Florida at the time of Anita Bryant's Crusade. It was therefore especially important to petitioner to obtain answers from the jurors to specific and focused questions dealing with their beliefs, experiences and prejudices.

The *voir dire* questions submitted to the trial court by petitioner were the very sort of questions *Smith* indicated were proper. (R.T. Vol. 5, A-125 to A-127.) For example, although a substantial number of jurors and their relatives held positions of responsibility in a church (R.T. Vol. 5, A-133 to A-136), the court refused to inquire whether these jurors would feel compelled to follow the dictates of their religion due to the fact they held church positions (R.T. Vol. 5, A-192) or whether the jurors could put aside their religious beliefs and follow the law as given them by the court (R.T. Vol. 5, A-124). The failure of the court to ask these and other proffered questions

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[20]In *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 56 and n. 6 (1973), this Court reserved judgment whether expert testimony is required "where contested materials are directed at such a bizarre deviant group that the experience of the trier of fact would be plainly inadequate to judge whether the material appeals to the prurient interest." Since the films in question herein exclusively depict homosexual acts, it was highly relevant to know whether the jurors had knowledge of the mores, customs and practices of the homosexual community to ascertain if their experience in the absence of expert testimony was inadequate to judge such material. Moreover, it bears noting that *no* expert testimony adduced in this case specifically concluded that the films appealed to the prurient interest of members of the homosexual community.

of the veniremen undoubtedly prejudiced petitioner. Perhaps if the Court had allowed petitioner Walter's Requested *Voir Dire* Question #11 ("able to view . . . *with open eyes* and an open mind.") (C.T. Vol. 2, Doc. 46 at 14), the Kohring incident would not have happened.

IX.

Due Process of Law Under the Fifth Amendment Required That Petitioner's Case Be Severed From Co-Defendant Sanders' so That Co-Defendant Grassi, Who Had Entered a Guilty Plea During Trial Could Testify to Exculpate Petitioner and Inculpate Sanders on the Scienter Issue, Which Grassi Had Indicated He Would Do but Not Unless There Were a Severance Since His Former Attorney Was Counsel for Co-Defendant Sanders and Could Impeach Grassi With Other Crimes Grassi Had Confidentially Communicated to Him if Grassi Waived His Attorney-Client Privilege and Testified in Favor of Petitioner and Against Co-Defendant Sanders.

At least five grounds necessitated the severance of petitioner's case from that of defendant Sanders. First, Sanders was the subject of much adverse pretrial publicity. (C.T. Vol. 1, Doc. 24.) Second, trial testimony of Carol Maxey depicted Sanders as having threatened her. (R.T. Vol. 9, E-86 to E-93.) Third, Carol Maxey testified to hearsay statements by Sanders which were improperly admitted against Walter, contrary to *Bruton* requirements. (R.T. Vol. 9, E-24 to E-26, E-33, E-39, E-44, E-45.) Fourth, Sanders was represented by an attorney who told a prosecution witness to "take the Fifth Amendment" and who drafted a government trial exhibit which the government contended was false (Appendix E). Fifth, had there been a

severance co-defendant Grassi would have testified without fear of impeachment by his former attorney Zell to exculpate Walter on the *scienter* issue regarding his absence of knowledge of the shipment and the character of its contents *prior* to its misdelivery. Each of the aforesaid grounds would warrant a severance; collectively, they cry out for it. A severance should have been granted under Rule 14, Fed. R. Crim. P., since petitioner's joint trial with defendant Sanders and his counsel was so prejudicial that it was a clear abuse of discretion not to grant a severance. See, *e.g., United States v. Marshall,* 532 P.2d 1279 (9th Cir. 1976).

X.

The Refusal of the District Court to Give Petitioner's Proffered Jury Instruction on His Theory of the Case Developed Through Cross-Examination That Certain Terms in the Obscenity Formulation Were Incapable of Calculation Deprived Petitioner of Freedom of Speech and Press and Due Process of Law, Contrary to the Provisions of the First and Fifth Amendments to the Constitution and the Interpretive Decisions of This Court.

One defense theory in the case was that certain terms in the obscenity formulation were incapable of ascertainment. For example, the defense contended both during cross-examination and final argument that it is impossible to calculate "the average person" and because that term is in the singular and includes men *and* women, then of necessity "the average person" must be a transsexual. (R.T. Vol. 10 at F-118, F-119; Vol. 11 at G-119 to G-121.) "The average person"

differs from "the average reasonable man" of tort law not only because the term is a logical impossibility, but also because it must be proved beyond a reasonable doubt instead of by a preponderance of the evidence.

The petitioner sought a jury instruction to the effect that if the jurors could not ascertain the meaning of certain terms in the obscenity formulation or could not compute them, then the jury must acquit. (C.T. Vol. 2, Doc. 45, at 20, No. 48.) This request was not unreasonable given the complexities of the obscenity law. No less an authority than Thomas Emerson has declared: "As used in the original *Roth* case, the prurient interest test is fantastically absurd." Emerson, *System of Freedom of Expression* at 487 (1970). Emerson also declared: "To measure obscenity by the average person test makes as much sense as measuring the violent overthrow of the government by its appeal to members of the Century Club." *Id.* at 488.

When a defendant requests an instruction on a particular defense theory, he is entitled to receive it unless it is unsupported by the evidence. Cross-examination alone may provide a sufficient basis for a defense theory of the case instruction. *United States v. Alfonso-Perez,* 535 F.2d 1362, 1365 (2d Cir. 1976); *United States v. Levy,* 578 F.2d 896, 903 (2d Cir. 1978); see *United States v. Garner,* 529 F.2d 962, 970 (6th Cir. 1976); *United States v. Swinton,* 521 F.2d 1255, 1260 (10th Cir. 1975), cert. denied, 424 U.S. 918 (1976) (dictum). In the case at bar petitioner's cross-

examination of the prosecution's expert witness directed itself at the impossibility of calculating "the average person." Therefore, petitioner was entitled to his requested instruction on a defense theory of the case.

Conclusion.

In view of the foregoing, Petitioner respectfully urges the Court to reverse the decision below.

Respectfully submitted,

W. MICHAEL MAYOCK,

Attorney for Petitioner.